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Commonwealth Of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Complaint And Petition Of The Massachusetts Oilheat )  
Council, Inc. and the Massachusetts Alliance For Fair )  
Competition Regarding Improper Promotional Practices ) D.T.E. # 00-57  
of The Boston Gas Company, The Colonial Gas )  
Company, and the Essex Gas Company and Petition )  
Seeking the Institution of a Payback Analysis )  
Requirement )

\_\_\_\_\_)  
  
MEMORANDUM IN OPPOSITION  
TO MOTION TO DISMISS  
OF  
THE MASSACHUSETTS OILHEAT COUNCIL, INC.  
AND  
THE MASSACHUSETTS ALLIANCE FOR FAIR COMPETITION

I. Preliminary Statement

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This memorandum is filed on behalf of the Massachusetts Oilheat Council, Inc. (MOC) and the Massachusetts Alliance for Fair Competition (collectively referred to as "complainants" or "petitioners") in response to the August 10, 2000 motion of Boston Gas Company, Colonial Gas Company and Essex Gas Company (collectively referred to as "Boston Gas", "utility" or "company") seeking a dismissal of the complaint/petition filed with the DTE on or about June 28, 2000. The motion alleges that the complainants have not specified any basis in fact or in law that justifies the Department's review and/or investigation of the issues raised in the complaint/petition. For the reasons set forth below, the utility's motion should be dismissed in its entirety.

## II. Argument

### A. The Motion To Dismiss Should Be Rejected To Permit The DTE To Investigate The Boston Gas VPI Program

The tenor and thrust of the complaint/petition is to call to the DTE's attention the VPI Program's potential harmful effects upon existing ratepayers, potential customers, competitors and the competitive marketplace. At a time when the need to enhance the viability of competitive energy markets is acute, a principle which this Department fully supports, it is not only advisable but necessary that the VPI Program be examined to assure that it does not exacerbate what is expected to be a difficult winter heating season for consumers, contractors and energy providers. Unfortunately, Boston Gas' response does not provide any answers to the allegations and concerns raised in the filing. Hiding behind a dismissal motion, the utility fails to provide any information, explanation or details of its VPI Gas Installer 2000 Program. For example, instead of explaining how the company proposes to assure that all contractors are treated equitably and fairly in their rotation under the VPI Program, or how cooperative advertising budgets (presumably set with ratepayer funds) will be established in a fair and equitable manner, or how the program does not discriminate against existing customers, the Company argues that the allegations raised by the petitioners lack any factual basis and therefore should be dismissed. This approach begs further inquiry since the only party that possesses the information is the utility itself. It is disingenuous for the utility to claim that there exists no factual basis when the information that is sought through the complaint/petition is exclusively within the hands of the utility.

In addition, the public interest is not served by treating the petition/complaint in a formalistic manner. The filing raises allegations and concerns about a utility sponsored program that could have detrimental effects upon the utility's existing and potential customers, upon competitors, and upon the marketplace. Not all of the relief requested in the complaint/petition are strictly allegations of violations. For example, the petitioners' request that the DTE establish a full disclosure and payback analysis for customers prior to performing any conversions does not allege a violation, but rather constitutes a request for action. Similarly, the filing requests that investigations be conducted into certain aspects of the VPI Program to learn of and insure that the program and its workings are not violative of the Department's policy supporting competition. Therefore, taking all the representations and allegations made in the complaint/petition as true, as the Department must on a motion to dismiss (See *Gaslantic Corporation D. P. U. /D. T. E.* 96-101 [1999]), dismissal of the motion would at least provide an opportunity for an investigation to assure that the program does not violate the public interest.

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### B. The DTE Possesses The Authority And Jurisdiction To Entertain And Investigate Petitioners' Claims

Boston Gas contends that since petitioners cite no statutory or regulatory provision, the Department possesses no jurisdiction to entertain the complaint/petition. This is incorrect.

The complainants' filing is a request for an agency investigation of an enormous utility sponsored program that affects the utility, its shareholders, its existing customers, its targeted customers, the HVAC marketplace and the energy choice marketplace. The complaint/petition was filed with the regulatory agency best suited to investigate practices of the regulated utility as it attempts to utilize its monopoly power and size to influence an unregulated market. To this end, we rely upon the general regulatory, statutory authority of the DTE, to regulate public utilities such as Boston Gas, as well as newly developed policies and principles established by the DTE in Orders and Opinions concerning the deregulated energy service marketplace. (1) As the utility knows, general statutory authority is found in M.G.L. 164 §76, which provides the Department with general supervision of all gas and electric companies, and M.G.L. 164 §76A, which provides the Department with general supervision of every affiliated company of a utility. The Opinions concerning the Department's principles and policies on competition are cited in the original filing and give the Department ample authority and jurisdiction to delve into the issues raised in the filing.

### C. The Complaint/Petition Does Not Allege Legal Claims Beyond the DTE's Subject Matter Jurisdiction

Contrary to the utility's contention, the petitioners' submission to the Department is not an antitrust complaint (Memo p. 6). (2) Specifically, there are no claims of conspiracy to fix prices, of conspiracy to monopolize or attempted monopolization, as is prohibited by the federal and state antitrust laws. Instead, the concerns set forth in the complaint/petition allege, not antitrust violations, but anti-competitive practices which the DTE can, under its own expertise and jurisdiction, fully investigate. For example, whether the VPI Program is utilizing ratepayer funds to benefit some ratepayers and not others, or is subsidizing the advertising cost of contractors to the detriment of others as alleged by the complaint/petition, are certainly issues the DTE can investigate. Whether Boston Gas should be engaged in promoting, maintaining and utilizing contractor lists is a utility practice which is subject to the DTE's review under its general supervisory powers. Just as the petitioners are not alleging any false advertising claims in their submission, they are not claiming any antitrust or seeking any form of antitrust violations relief in this forum.

### D. The DTE Should Investigate The Relationship Between Boston Gas And Its Affiliate ServiEdge Under the VPI Program

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It is undisputed that ServiEdge will participate in the VPI Program along with other appliance service contractors. The petitioners have no objection to ServiEdge participating in any promotional program so long as the utility's program does not provide any unfair advantage to the affiliate. Given the relationship between the utility and its affiliate, it is only natural for contractors to question the method and manner ServiEdge will be treated.

Boston Gas responds that there is no basis for any such inquiry because the corporate separation existing between ServiEdge and Boston Gas provides an "effective solution" to any problems of anticompetitive transactions and cross-subsidization (Memo p. 8). Although corporate separation, which the petitioners fully support, may lessen anticompetitive transactions, it certainly does not absolutely and fully prohibit their occurrence. For example the utility has not explained how it will apply its VPI Program in a fair and equitable manner between participating contractors including ServiEdge. Consequently, the diversion of utility revenues concerning free equipment, cooperative advertising, specialty training, market leads or trade ally assistance could very well flow in a disproportionate amount to ServiEdge in violation of the very abuses the corporate separation approach was designed to prevent. (3)

With regard to the Boston Gas/ServiEdge relationship, the utility has provided no direct answers. It would seem more logical and practical for the DTE to assure that a fair and equitable program is in place rather than discovering after-the-fact that an unfair and preferential program was being administered and then seeking some remedy after harm has been inflicted.

### E. The Complaint/Petition Does Not Challenge Legitimate Promotional Programs and Expenditures

The utility misinterprets the nature of the complaint/petition. Boston Gas argues that it does not possess any market influence as a monopoly in the energy services area, that it is pursuing legitimate business objectives, that it is entitled to cost recovery for promotional practices, and that complainants/petitioners are seeking the Department's assistance for individual protection in the unregulated marketplace. (Memo pp. 3-5). Each of these misconceptions should be rejected.

First, the petitioners do not contend that Boston Gas possesses a monopoly in the energy appliance and home improvement contract markets, but rather that it is using its market power as a regulated gas utility to engage in practices which may unfairly impact those competitive markets including its own ratepayers, potentially new customers, competitors, and the public at large. The petitioners do not contest any effort by Boston Gas to promote its own products and services in a lawful manner. However, when the programs adopted by a regulated utility are designed to discriminatorily provide benefits and advantages to a certain segment of the marketplace through either the utilization of utility funds, or the use of utility monopoly status, then petitioners believe that the Department should be concerned and should investigate.

Similarly, the filing by the petitioners does not contest any legitimate promotional expenditure which utilizes utility funds. However, at this point in time, we cannot, without the utility explaining its own internal processes know, for example, the nature and extent of utility ratepayer funds used for the promotion of the VPI Program and whether such funds are being utilized in an appropriate manner. (4)

Perhaps the most illogical assertion made by Boston Gas in its motion is the claim

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that the petitioners seek to use the Department "to obtain protection from the competition that will stem from the Company's marketing efforts". (Memo p. 4). In contrast, the petition is designed to assure that fair market practices allow all market participants to participate and compete on a level playing field. The members of MOC and the Alliance welcome competition from anyone, including a utility or its affiliate, provided that the competitor does not utilize its monopoly position to influence the competitive marketplace.

Boston Gas also argues that the Department is not required to guarantee the success of market entrants, but instead should focus on establishing structural conditions necessary for efficient competitive processes. (Memo p. 5, citing DTE 98-32-B [1999]). Petitioners agree and respectfully submit that it is through the complaint/petition that the petitioners seek assurance that the competitive principles espoused by the DTE will enable all market participants to compete on an equal footing. Plainly, a small family-owned home improvement contractor that is unable or does not participate in the VPI Program cannot compete with the likes of a ServEdge who will benefit from utility/ratepayer-funded advertising, customer leads, trade ally support, and free equipment.

#### F. Boston Gas Offers No Reason Why It And Other Utilities Should Not Provide Potential Conversion Customers With A Payback Analysis

Boston Gas argues that there is no basis for the DTE to investigate or order utilities to provide potential conversion customers with a payback analysis. (Memo p. 15). The utility further asserts that federal and state laws regulating false advertising provide ample consumer protection to these conversion customers. Boston Gas is incorrect on both points.

It is undisputed that the Department possesses jurisdiction and regulatory authority over the utility in its activities to attach new customers. While growth of a customer base is usually viewed as economically attractive, such conversions and growth must be economical and beneficial for the utility itself, its existing ratepayers, and its new customers. Consequently, the Department possesses ample authority to order utilities to provide potential customers with a payback analysis so that full disclosure is available to them in making an expensive decision in converting their heating system to natural gas.

The necessity and use of this information is especially important for the coming heating season. By all accounts, both natural gas and oil prices will be high this winter. Since Boston Gas will undoubtedly pursue its VPI Program to aggressively promote conversions, it is only logical and fair that these customers be fully informed of the full costs of such a conversion, as well as the payback period for undertaking such a conversion. An August 15, 2000 Boston Globe article reported that a Rockport, Massachusetts resident undertook Boston Gas' offer of free heating equipment, but nonetheless incurred \$3,000 in labor costs to replace an oil furnace. (Article annexed hereto as Attachment A). In that article, consumer advocates warned that converting to gas will not necessarily bring down energy costs because natural gas is expected to be very expensive for a few years. Consequently, it only makes sense that consumers, who are lured by the prospect of receiving free equipment, not be enticed into undertaking conversions which may cost them more for their energy needs.

Boston Gas is also incorrect in asserting that the false advertising laws protect these consumers. Those laws provide relief to harmed individuals once the deception has occurred. Assuming that a cause of action existed for such individuals, the harm

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is irreparable both to the customer and to the marketplace. For the customer, it is unlikely that a residential consumer would commence a costly false advertising claim against the utility because of a lack of full disclosure. Even if such a consumer commenced an action and was successful, it is unlikely that the consumer would recover the additional capital costs to convert back to the original energy source and system. Consequently, energy choices will have been made not based on competitive forces of the marketplace, but on lack of full information.

It seems much more logical, equitable and fair for consumers to know the entire costs involved in a conversion and the payback term for undertaking such a conversion prior to making a decision. The public interest would be served by providing homeowners and commercial customers with information to permit them to make an informed and intelligent choice.

#### G. The Department Possesses The Ability To Investigate Any Discrimination Plan Of The Utility's Gas Heat Customers

Boston Gas also argues that the petitioners/complainants do not have legal authority or standing to assert a claim of ratepayer discrimination. (Memo p. 11). This point is without merit. As the Department is fully aware, its authority and responsibility of insuring that ratepayers are provided with safe and adequate service at just and reasonable rates is its primary charge as the regulating agency. Consequently, whether a concern, issue or violation is brought to the Department's attention, either from the harmed party, or a third party that is indirectly harmed, the Department possesses authority and justification for any investigation. Indeed, the Department can sua sponte investigate any rate matters it deems necessary. Consequently, the utility's objection based on standing should be rejected. Moreover, in an environment where the Department is concerned with preserving and enhancing the integrity of competitive energy markets and has supported the deregulation of the electricity and natural gas commodity markets, it is only rational and equitable for the Department to afford competitors the ability to raise legitimate competitive concerns.

#### H. The Department Should Undertake An Investigation To Assure That Its Pro-Competitive Policies Are Not Undermined By The Utility

Boston Gas argues that the petitioners' claims concerning use of contractor lists, the Free Heating Equipment Program, the Co-op Advertising Program, among other concerns, are mere general assertions of anti competitive behavior which should not be investigated by the Department but rather be brought to Court. (For example, see Memo p. 12, Points B and C). This contention would leave the Department without the ability to enforce its own principles and policies.

As noted in the complaint/petition, the Department's recent pronouncements concerning the competitive energy and market, and related competitive energy services, are of paramount importance to the public interest of the Commonwealth (See Point F of complaint/petition). It makes little sense to argue that the

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Department cannot investigate and take action on utility programs and activities which may directly or indirectly hamper, harm or impede competition and the principles espoused by the Department concerning competition. The utility's position places the DTE in the illogical position of promoting competition with its pronouncements, but having no ability to assure the success of its policies.

Finally, as noted above, since the complaint/petition does not allege allegations that are exclusively within the province of the courts (i.e., false advertising or anti-trust violations), the Department may undertake an investigation and make its own evaluation.

#### I. There Is No Need For The Complainants/Petitioners To Pursue The Department's Dispute-Resolution Process

Boston Gas contends that any questions or challenges regarding the utility and its affiliate ServisEdge must first be resolved through a dispute resolution process as codified in the Department's regulations (220 C.M.R. 12.04[18]). This point is misplaced for several reasons.

First, the complainants/petitioners are requesting that the Department conduct an investigation concerning the program and potentials for abuses and violations. Neither petitioner is contending a personal violation that would require that the dispute resolution process be followed.

Second, the request for an investigation into ServisEdge is one element of a variety of issues raised in the filing. It makes sense for all these issues to be resolved simultaneously in one forum before the Department.

Next, and most significantly, it would make little sense for the petitioners to file a request to conduct an investigation into the Boston Gas/ServisEdge relationship under the VPI Program with Boston Gas itself. Clearly such a request would be rejected and would be futile. The Company has made very clear its response that it does not view anything in the VPI program as violative of any regulatory or legal standard. Consequently, pursuing this matter under the dispute resolution process would ultimately end up before the Department.

#### J. The Department Should Undertake An Investigation Of The VPI Program During Which The Program Should be Suspended

As noted in the complaint/petition, MOC and the Alliance feel strongly that pending the outcome of this motion, as well as any subsequent investigation, the VPI program be suspended. The potential for harm that could be created in permitting the VPI Program to be fully implemented this Fall would be irreparable. For customers who convert, for contractors who lose business opportunities to VPI contractors, for oil dealers who lose customers based on the promotional program, it is little comfort if the program is directed to be modified or terminated some time in the future. Moreover, a suspension of the VPI Program does not prohibit Boston Gas from pursuing other promotional programs or encouraging conversions in the marketplace. A suspension of the program pending this motion and subsequent investigation would not harm the utility. Consequently, the petitioners feel that the suspension is both logical and justified.

III. Conclusion

For the above stated reasons, MOC and the Alliance respectfully request that the motion to dismiss be denied.

Respectfully submitted,

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Albany, New York

1. We do not believe that the movants seriously contend that absent a specific  
(footnote continued on following page)

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statutory or regulatory cite, a complaint/petition or request for investigation cannot be maintained based on the principles and policies established by the Commission's own Orders and Opinions or where the public interest would be served.

2. An antitrust case is not the only avenue of relief available to a competitor that may be potentially harmed by a utility sponsored program. Anticompetitive practices, particularly those which may harm the ratepayer or potential ratepayer, certainly can be investigated by the Department for violations unrelated to federal and state



anti-trust laws.

3. Similarly, based on representations made by KeySpan Energy that it would undertake shared marketing efforts with Eastern Enterprises, the petitioners requested an investigation of Boston Gas' pre-merger activities (See Complaint/Petition, Point G and Exhibit C).

4. The utility cites a number of cases wherein the Department authorized rate recovery for gas utility promotional activities. (Memo p. 4). None of these cases involved the scope and extent of the VPI Program and all preceded Department opinions concerning the deregulation of the energy services market. While the petitioners agree that the utility may legitimately recover certain of its promotional expenses through ratepayer funds, it does not necessarily follow that those funds being utilized for the VPI program should escape scrutiny from the Department.